In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

CHARLES R. STEWART
(Chapter 7 Case 94-41518)

Debtor

CHARLES R. STEWART

Plaintiff

v.

UNITED STATES OF AMERICA and
THE INTERNAL REVENUE SERVICE

Defendant

Adversary Proceeding

Number 99-4171

FILED
at 11 O'clock & 00 min A M
Date July 10, 2000
MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia

and

CERYLE L. STEWART
(Chapter 7 Case 96-41379)

Debtor

CERYLE L. STEWART

Plaintiff

v.

UNITED STATES OF AMERICA and
THE INTERNAL REVENUE SERVICE

Defendant

Adversary Proceeding

Number 99-4196

AO 72A
(Rev. 8/82)

MEMORANDUM AND ORDER

FINDINGS OF FACT

Debtors Charles and Ceryle Stewart, husband and wife, filed separate actions against the United States of America, acting by and through the Internal Revenue Service (hereinafter referred to as "IRS"), seeking actual damages and attorney's fees for the Defendant's alleged willful violation of the discharge injunction of 11 U.S.C. § 524(a)(2). When the case was called for trial the counsel for the Debtors and counsel for the United States entered into a stipulation of facts which follows:

1. Debtor Charles Stewart filed a Chapter 13 bankruptcy case on August 25, 1994. The case was converted to a case under Chapter 7 on February 1, 1995.

2. Debtor Charles Stewart received a discharge in his Chapter 7 bankruptcy case on October 12, 1995. By Consent Order entered October 12, 1995, the Bankruptcy Court held that the Debtor's federal income tax liabilities for the taxable years 1982 through 1988, inclusive, were not excepted from discharge in the Debtor's Chapter 7 bankruptcy case. The Debtor's federal income tax liabilities were joint liabilities with his wife, Ceryle Stewart.

3. Debtor Ceryle Stewart filed a Chapter 7 bankruptcy case on June 4, 1996.

4. Debtor Ceryle Stewart received a discharge in her Chapter 7 bankruptcy case on January 14, 1997. By Consent Order entered November 4, 1996, the

Bankruptcy Court held that the Debtor's federal income tax liabilities for the taxable years 1983 through 1989, inclusive, were not excepted from discharge in the Debtor's Chapter 7 bankruptcy case. The Debtor's federal income tax liabilities were joint liabilities with her husband, Charles Stewart.

5. While the IRS received notice of the discharges entered by the Bankruptcy Court in both bankruptcy cases, the IRS did not initially abate the Debtors' joint federal income tax liability for 1988.

6. On November 2, 1998, the IRS mailed the Debtors a collection notice with respect to their joint 1988 federal income tax liability which had been discharged in each of their Chapter 7 bankruptcy cases. The notice listed a total liability due of $16,403.39.

7. On November 2, 1998, the IRS also mailed the Debtors a Notice of Intent to Levy with respect to their joint 1992 federal income tax liability which was not discharged in either of their Chapter 7 bankruptcy cases. The collection notice listed an outstanding liability of $16,316.43.

8. On November 17, 1998, the Debtors' attorney, R. Wade Gastin, contacted the IRS regarding the November 2, 1998, collection notice with respect to the Debtors' discharged liability for 1988.

9. As a result of the contact from Mr. Gastin, the IRS immediately requested the abatement of the Debtors' joint federal income tax liability for 1988. The remaining liability in the amount of $5,721.56 was abated on December 7, 1998.

10. The IRS also discovered the Debtor Ceryle Stewarts' 1996 and 1997 federal income tax overpayments, based on tax returns she filed separate from Debtor Charles Stewart, had been improperly applied to the Debtors' joint income tax liabilities for 1988. As a result, the IRS reversed the credits for these overpayments and refunded the overpayments directly to Debtor Ceryle Stewart.

11. The reversal of the overpayment creditors on the Debtors' joint federal income tax account generated a balance on the account in the amount of $2,404.02 even though the tax liability had been previously abated.

12. On March 15, 1999, based upon the resulting balance on the Debtors' 1988 account, $2,404.02 of Debtor Ceryle Stewart's 1998 federal income tax overpayment (which totaled $3,127.00) was applied in satisfaction of the 1988 joint account instead of in partial satisfaction of the Debtors' joint 1992 federal income tax account. The remaining $722.98 of her 1998 income tax overpayment was applied toward the joint 1992 liability. The IRS mailed the Debtor Ceryle Stewart a notice detailing the application of the overpayment on March 22, 1999.

13. As a result of the notice, on March 17, 1999, Mr. Gastin contacted the IRS regarding the offset of Debtor Ceryle Stewart's 1998 federal income tax overpayment to the Debtors' 1988 account. At that point, the IRS discovered the outstanding balance on the Debtors' 1988 account.

14. On March 18, 1999, the IRS applied Ceryle Stewart's 1998 overpayment of $2,404.02 to the Debtors' joint 1992 federal income tax liability and

abated the balance on the Debtors' joint 1988 account.

15. Beginning in 1993, the Debtors filed separate federal income tax returns.

16. Debtor Charles Stewart filed a federal income tax return for 1993. The assessed tax, interest, and penalties for this tax period was $15,245.91. However, to date, the Debtor has made no payments toward this liability. The IRS mailed the Debtor a Notice of Intent to Levy on November 2, 1998, with respect to this liability, the same day the Debtors were mailed a Notice of Intent to Levy for their discharged 1988 liability.

17. Debtor Charles Stewart filed a federal income tax return for 1995. The assessed tax, interest, and penalties for this tax period was $304.25. However, to date, the Debtor has made no payments toward this liability. The IRS mailed the Debtor a Notice of Intent to Levy on November 2, 1998, with respect to this liability, the same day the Debtors were mailed a Notice of Intent to Levy for their discharged 1988 liability.

18. Debtor Charles Stewart filed a federal income tax return for 1996. The assessed tax, interest, and penalties for this tax period was $6,098.53. However, to date, the Debtor has made no payments toward this liability. The IRS mailed the Debtor a collection notice with respect to this liability on April 19, 1999.

19. Debtor Charles Stewart filed a federal income tax return for 1997. The assessed tax, interest, and penalties for this tax period was $10,078.19. However, to date, the Debtor has made no payments toward this liability. The IRS mailed

the Debtor a Notice of Intent to Levy on January 11, 1999, with respect to this liability.

20. Debtor Charles Stewart filed his above-captioned adversary proceeding on October 18, 1999, alleging that he suffered damages because the IRS willfully violated the discharge injunction in his Chapter 7 bankruptcy case by mailing him a collection notice with respect to the Debtors' joint 1988 federal income tax liability.

21. Debtor Ceryle Stewart filed her above-captioned adversary proceeding on December 23, 1999, alleging that she suffered damages because the IRS willfully violated the discharge injunction in her Chapter 7 bankruptcy case by applying her 1998 federal income tax overpayment toward the Debtors' joint 1988 federal income tax liability.

To summarize these findings, Debtors both previously filed Chapter 7 cases and received discharges. As a result of previous litigation with the government, a determination was reached that their joint tax liability for the year 1988 was discharged. Mr. and Mrs. Stewart remain indebted for their joint tax liability for the year 1992. In November of 1998, the IRS mailed the Stewarts a collection notice seeking recovery of the previously discharged 1988 tax liability, a notice of intent to levy with respect to their 1992 tax liability which had not been discharged, and collection notices for Mr. Stewart's tax liabilities for the 1993 and 1995 tax years. Immediately upon contact from the Stewarts' counsel, the collection notice regarding the 1988 discharged liability was revoked. However, when the IRS took this action it discovered that it had retained

overpayments from other tax years and improperly applied them to the Debtors' joint liability for 1988. Upon this discovery the overpayments were remitted directly to Mrs. Stewart. When that payment was reversed, the records of the IRS erroneously showed an outstanding balance for 1988 of $2,404.02. On March 15, 1999, Mrs. Stewart's 1998 tax overpayment was applied to pay-off what appeared to be the balance of that 1988 discharged liability and the remainder was applied to the Stewarts' non-discharged 1992 liability. Again, after contact from the Stewarts' counsel, the IRS corrected its records, removed the sums improperly applied to the 1988 liability, and credited them to the 1992 liability. Since that date IRS has engaged in no further collection activity on the discharged 1988 obligation.

The Stewarts bring this action alleging willful violation of the discharge injunction by sending the collection notice regarding the 1988 liability and by applying Mrs. Stewart's 1998 income tax overpayment, at least temporarily, to the discharged 1988 liability. Mrs. Stewart did not testify for reasons personal to her and thus there was no evidence of any emotional distress or in fact any compensable injury which she suffered. Mr. Stewart testified that when the intent to levy notice was received regarding the discharged 1988 obligation his wife became furious and that the two of them had to hire counsel in order to straighten the matter out. There was no other testimony on his part as to any monetary loss or other damage which he individually suffered.

The Stewarts have incurred attorney's fees during the pendency of this action in the amount of $2,565.00 in Mr. Stewart's case and $1,365.00 in Mrs. Stewart's case at counsel's usual and customary rate. Of that amount approximately $450.00 was incurred to notify the IRS of its error and obtain its voluntary action to correct same.

The Stewarts' counsel takes the position that because the notices sent in 1999 represented a recurrence of the IRS's earlier error in 1998 which did not result in litigation that the Debtors are entitled to seek recovery of attorney's fees, costs, and damages notwithstanding the fact that the erroneous actions taken in 1999 were quickly corrected once notice was given to the IRS. Counsel for the United States admits that there was a violation of the discharge injunction, but denies that it was willful and malicious, asserts that the IRS acted immediately upon discovery of the error to correct their records, and that it refunded some overpayments which had been improperly applied rather than reapplying them to subsequent years' tax liabilities which still remained outstanding and undischarged.

As to Mrs. Stewart the government argues that she did not testify and there is no competent evidence that she suffered any damages. As to Mr. Stewart, the government argues that the single notice he received on account of a discharged liability could not have objectively caused any damage because he is perennially in violation of the Internal Revenue laws of the United States having made no voluntary payments on any

income tax liability which he separately owes since at least 1993 and that he regularly receives notices which are lawfully issued as part of the IRS's ongoing efforts to collect taxes admittedly due for those numerous years.

CONCLUSIONS OF LAW

1. The Internal Revenue Service violated the permanent discharge injunction imposed by Section 524 of the Bankruptcy Code by sending the Plaintiffs a collection notice with respect to their discharged federal income tax liability for 1988 and crediting Plaintiff Ceryle Stewart's 1998 federal income tax overpayment toward the discharged liability.

Under Section 524(a)(2) of the Bankruptcy Code, a discharge entered by the Bankruptcy Court with respect to a debt of a debtor in a Chapter 7 bankruptcy case "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2).

The United States may be liable for damages under Section 7433(e) of the Internal Revenue Code, "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section . . . 524 (relating to effect of discharge) of title 11 . . ." 26 U.S.C. § 7433(e)(1). The IRS willfully violates the discharge injunction, in place pursuant to Section 524, if it knows the injunction is in place and intends the actions that violate the

injunction. Hardy v. United States, 97 F.3d 1384, 1390 (11th Cir. 1996).

The IRS willfully violated the permanent discharge injunction in the Plaintiffs' Chapter 7 bankruptcy cases. The IRS was aware that the Plaintiffs' joint 1988 federal income tax liability had been discharged in each of their separate Chapter 7 bankruptcy cases. Despite this knowledge, the IRS sent the Plaintiffs a Notice of Intent to Levy with respect to this discharged liability and temporarily setoff Plaintiff Ceryle Stewart's 1998 federal income tax overpayment against this liability. These actions constitute a willful violation of the discharge injunction under Hardy.

2. The Plaintiffs did not suffer any compensable damages as a result of the IRS's violations of Section 524 of the Bankruptcy Code.

Once a party has proven that she has been damaged by violation of the discharge injunction or automatic stay in her bankruptcy case, she must show the amount of damages with reasonable certainty. Matthews v. United States, 184 B.R. 594, 600 (Bankr. S.D. Ala. 1995).

The record reflects that the Plaintiffs have not produced any documentation in support of any monetary damages they may have suffered. While the Plaintiffs have alleged that they have suffered actual damages as a result of the actions of the IRS, they can produce no specific evidence in support of any financial loss. In fact, the Plaintiffs suffered no financial hardship as a result of the actions of the IRS. First,

while the IRS mailed the Plaintiffs a Notice of Intent to Levy on November 2, 1998, the IRS received no payments from the Plaintiffs as a result of this notice. Second, even though the IRS erroneously applied Plaintiff Ceryle Stewart's 1998 federal income tax overpayment toward the Plaintiffs' discharged 1988 liability, the Plaintiff had no interest in these funds as the IRS was statutorily permitted to apply this overpayment toward the Plaintiffs' outstanding 1992 federal income tax liability, which the IRS did on March 18, 1999. Third, the IRS mitigated any damages the Plaintiffs may have suffered. Immediately after the IRS was contacted by the Plaintiffs' attorney on November 17, 1998, the IRS abated the Plaintiffs' 1988 liability and provided assurances that no further collection actions were taken. Further, when the IRS was informed on March 17, 1999, that Plaintiff Ceryle Stewart's 1998 overpayment was improperly applied to the discharged liability, the IRS immediately applied the overpayment to the Plaintiffs' joint 1992 liability and abated the outstanding balance of the 1988 liability.

To the extent the Plaintiffs claim damages for emotional distress, the Plaintiffs must prove that their mental anguish was more than "fleeting and inconsequential" to be entitled to damages. Washington v. IRS (In re Washington), 172 B.R. 415, 427 (Bankr. S.D.Ga. 1994), aff'd in part, reversed in part, United States v. Washington, 184 B.R. 172 (S.D.Ga. 1995). While the Plaintiffs are not required to provide medical testimony in order to be awarded emotional distress damages, United States v. Flynn (In re Flynn), 185 B.R. 89, 93 (S.D.Ga. 1995), they have failed to prove

their mental anguish was sufficient to warrant damages under Section 7433(e)(1). *Compare* Washington, 172 B.R. at 427 (finding embarrassment suffered by debtor from post-petition levy on her wages where no funds were actually remitted to the IRS was "fleeting and inconsequential" and no damages for mental anguish were warranted) *with* Flynn, 185 B.R. at 93 (holding that award of damages for mental anguish was warranted as a result of freeze on debtor's checking account that forced the cancellation of her son's birthday party and created worries that her checks would bounce).

The Plaintiffs did not suffer any legitimate mental anguish as a result of the actions of the IRS in violation of the permanent discharge injunction. While the Notice of Intent to Levy mailed to the Plaintiffs threatened collection actions for a $16,403.39 liability, on the same day the Debtors also received a valid Notice of Intent to Levy with respect to their nondischarged joint income tax liability for 1992, with a balance of $16,316.43, which the Plaintiffs were aware was due and owing. On the same day, Plaintiff Charles Stewart also received a valid Notice of Intent to Levy with respect to his federal income tax liability for 1993 that demanded the payment of the outstanding balance of $15,245.91 as well as a valid collection notice for his 1995 tax liability. Faced with enforced collection of in excess of $31,000.00 for their 1992,1993, and 1995 income tax liabilities, the Plaintiffs had no basis to specifically fear the collection of the 1988 liability. Further, Plaintiff Ceryle Stewart faced no mental anguish with respect to the application of her 1998 federal income tax overpayment to the discharged 1988 tax liability as she was

aware of the Plaintiffs' joint liability for 1992 and that the IRS could setoff the overpayment against that outstanding liability.

A bankruptcy debtor is not injured by the issuance of a computer generated IRS notice of intention to levy if the debtor received assurances from the IRS that the IRS will not seek to collect a tax liability referenced in the notice during the pendency of the debtor's bankruptcy case despite the issuance of the notice. In re Brock Utilities and Grading, Inc., 185 B.R. 719, 720 (Bankr. E.D.N.C. 1995). In Brock Utilities, the debtor was issued a computer-generated notice of intent to levy with respect to a prepetition tax liability after the filing of its bankruptcy case. Id. at 719. Despite the mailing of the notice of intent to levy, the debtor had previously received assurances from the IRS that the IRS would take no collection actions against the debtor in violation of the automatic stay. Id. The Bankruptcy Court denied the debtor's motion for sanctions against the IRS for violation of the automatic stay, holding that the debtor was not injured despite the issuance of the notice of intent to levy because a simple phone call to the IRS would have allayed any fears of forced collection activities and no forced collection actually took place. Id. Similarly, in the present case, when the Plaintiffs' attorney contacted the IRS, the IRS provided assurances that no forced collection actions would take place with respect to the Plaintiffs' joint 1988 tax liability and that the liability would be abated. As a result, the contact with the IRS by the Plaintiffs' attorney should have allayed any fears of forced collection and eliminated any justification by the Plaintiff for damages.

3. Attorney Fees.

Debtors requested an award of attorney fees for the willful violation of the discharge order in both adversary proceedings. The Court, having found that the IRS willfully violated the discharge injunction, will consider an award of attorney fees. At trial, the United States did not seriously dispute an award of attorney fees to rectify the matter and acknowledged that a nominal amount of attorney fees would be appropriate. However, the United States disputed the amount of attorney fees totaling $3,930.00 requested by Debtors' counsel for bringing the adversary proceedings. Section 106 of the Bankruptcy Code provides the basis for the Court to award attorney fees against a governmental unit. 11 U.S.C. § 106(a)(3) provides:

> The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

11 U.S.C. § 106(a)(3). Thus, an award of attorney fees against a governmental agency is subject to the limitations of 28 U.S.C. § 2412, the Equal Access to Justice Act ("EAJA"). The EAJA provides in part, "[u]nless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys. . . to the prevailing party in any

civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action." 28 U.S.C. § 2412(b). Any award of attorney fees is limited to a rate of $125.00 per hour. 28 U.S.C. § 2412(d)(2)(A). In this case, the Court recognizes that the Debtors' attorney had to bring this matter to the IRS's attention on two different occasions before the matter was resolved internally by the IRS. The Court, upon review of the application, finds that Debtors' attorney expended 3 hours of time toward resolving the matter administratively. Accordingly, the Court finds that an appropriate award for attorney fees, set at the rate of $125.00 per hour under 28 U.S.C. § 2412, is $375.00.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that judgment be entered in favor of Plaintiffs and against Defendant in the amount of $375.00 in attorney's fees.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 7th day of July, 2000.